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IN THE

Supreme Court of the United States

October Term, 1962.

No. 504

ROY I. MARTIN and ELIZABETH E. MARTIN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Roy I. Martin and Elizabeth E. Martin pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit in the above-entitled case.

OPINIONS BELOW.

The opinion of the Tax Court of the United States (R. 35a-42a) [1] is reported at 36 T. C. 556. The opinion of the Court of Appeals (App. 9-12) is reported at 10 A. F. T. R. 2d 5013.

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1. "R." refers to page numbers of petitioner's appendix filed with the Court of Appeals; "App." refers to the appendix of this petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 28, 1962 (App. 13). A Petition for Rehearing timely filed was denied on August 15, 1962 (App. 14). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

Where a corporation, on the death of an employee, voluntarily makes payments to the employee's widow in recognition of his past services to the corporation, and where the corporation was under no obligation to make such payments, and the widow had never performed any services for the corporation, are such payments taxable income to the widow under Section 61(a)(1) of the Internal Revenue Code of 1954 or excludable from income as gifts under Section 102(a) of the Code?

STATUTES INVOLVED.

Internal Revenue Code of 1954 (26 U. S. C.):

Section 61. Gross Income Defined.

(a) General Definition. Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited) to the following items:

(1) Compensation for services, including fees, commissions and similar items.

Section 102. Gifts and Inheritances.

(a) General Rule. Gross income does not include the value of property acquired by gift, bequest, devise or inheritance.

STATEMENT.

The facts in the case were undisputed. Petitioner, Elizabeth E. Martin, was, prior to her remarriage, the widow of Arthur Purdy, who died November 3, 1954 (R. 2a). At his death, Arthur Purdy was President of the A. R. Purdy Co., Inc., at an annual salary of $32,500 (R. 2a). He, or his estate, were paid in full all compensation due him at the time of his death (R. 2a).

Shortly after Mr. Purdy's death, the new president of the Company, who was the brother-in-law of the decedent, directed the treasurer of the corporation to pay $2,500 to petitioner, Mrs. Purdy (now Mrs. Martin), to take care of any immediate cash needs (R. 30a-31a). On December 28, 1954 a meeting of the board of directors (including Petitioner, Mrs. Martin) of the corporation was held. The minutes of the meeting contain, in part, the following (R. 2a, 3a, 7a, 37a, 38a):

> "The Chairman again referred to the untimely death of the Company's President, Mr. Arthur R. Purdy, who had been associated with the Company since June 15, 1936, stating that his services to the Company had endeared him to all the officers and employees so his loss was deeply felt by all associated with the Company. In view of Mr. Purdy's long and loyal service to the Company, the officers thought that his salary should be continued to be paid to his widow, Mrs. Elizabeth Ellis Purdy, for a reasonable period of time after his death in recognition of such service. After consideration and upon motion duly made and seconded, the following preambles and resolutions were unanimously adopted:
>
> WHEREAS, Arthur R. Purdy, President of this Company, died on November 3, 1954, and

WHEREAS, he had been associated with the Company for more than 18 years and had rendered loyal and faithful service to the Company, and

WHEREAS, the Directors believe that recognition of such service should be made and that his salary should be paid for a reasonable period of time to his widow, Mrs. Elizabeth Ellis Purdy, now therefore be it

RESOLVED: that subject to further action of this Board, this Corporation in recognition of the services rendered to it by Arthur R. Purdy, former President of this Corporation, pay to his widow, Mrs. Elizabeth Ellis Purdy, an amount equivalent to his salary of $32,500 per annum in monthly installments of $2,708.33 each for a period of 24 months commencing November 1954 and ending with the month of October 1956."

The payments referred to in the minutes were duly made, $5,000 in 1954 and the balance in 1955 and 1956 (R. 3a). Mrs. Purdy had never performed, nor did she thereafter perform any services for the Company (R. 21a-22a). Petitioners excluded the payments from the gross income set forth in their income tax returns, although riders were attached to the returns acknowledging receipt of the payments but claiming that the same were gifts and, as such, did not constitute "income." The respondent determined deficiencies for the years in question (1955 and 1956) by including those payments in taxable income (R. 39a).

In due course the taxpayers petitioned the Tax Court for a redetermination of the deficiencies. At the trial, the record consisted of a stipulation and the testimony of two directors, John Eiseman, a director representing a bank, and Ralph W. Shaw, who succeeded Mr. Purdy as president of the Company. Both of the directors had voted for the resolution. Their testimony corroborated the facts set forth above and confirmed that the payments had been made in recognition of the past services of Mr. Purdy (R. 6a-24a).

The Tax Court sustained the deficiency, holding that under the decision of this Court in *Commissioner v. Duberstein*, 363 U. S. 278 (1960), the taxpayers had not met their burden of proof of establishing that the payments were gifts (R. 35a-47a). The Tax Court made no ultimate finding that the payments were additional compensation.

Petitioners took an appeal from this decision to the Court of Appeals for the Third Circuit, arguing that the issue involved was a pure question of law. Nevertheless, the Court of Appeals affirmed on the ground that, under the *Duberstein* decision, the issue presented in this case was one of fact and the Court's scope of review was limited to determining whether or not the finding of fact was clearly erroneous. The Court held that the Tax Court's decision, that petitioners had not met their burden of proof, was not shown to be clearly erroneous.

REASONS FOR GRANTING THE WRIT.

1. The decision below is in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Kuntz v. Commissioner*, 300 F. 2d 849 (1962) and with the decisions of the Court of Appeals for the Eighth Circuit in *Olsen v. Commissioner*, 302 F. 2d 671 (1962) and, we believe, with *United States v. Frankel*, 302 F. 2d 666 (1962).[2]

Petitions for writs of certiorari have been filed in *Kuntz*, October Term, 1962, No. 394, *Olsen*, No. 395, *Frankel*, No. 396 and *Smith*, No. 471. These petitions set forth the background of the controversy presented in these cases. To avoid unnecessary burden on the Court, the matters set forth therein will not be repeated here. Two points may be emphasized, however.

(a) The first point is that the issue presented in the "corporation-widow" cases is one of law, not one of fact.

2. Copies of the opinions in these cases are included in the petitions for certiorari filed in this Court in these cases.

Note of this may be taken in two ways. First, a review of the 45 or more cases that have been decided on the "corporation-widow" situation shows that the same factual pattern is to be found in all of them; in substance, the cases are factually indistinguishable.[3] Secondly, many courts, including the Tax Court, in some 32 cases decided before the decision of the Tax Court in *Pierpont's Estate v. Commissioner*, 35 T. C. 67 (1960), remanded, 301 F. 2d 287 (4 Cir. 1962), had uniformly held that payments by corporations to widows of deceased officers were gifts.[4] Such factual differences as were present in those cases were immaterial and had no effect on the result. Similarly, since *Pierpont*, the District Courts have held such payments to be gifts.[4] However, in *Pierpont* and some eleven succeeding cases, the Tax Court has uniformly held that such payments were not gifts.[4] Again, factual differences have not affected the result.

The reason for the uniformity is that the controlling facts necessarily are the same. The parties involved in each case are the same, i.e., the corporation and the widow; the relationship between them is the same, i.e., the payee is the widow of a deceased employee of the corporation; the relationship between them in each case arises at the same time, and from the same event, i.e., the death of the employee and widowhood of the payee; the occasion of, and cause of, the payments in each case is the death of the employee and the inception of widowhood; and, finally, the

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3. Compare, for example, *Florence S. Luntz*, 29 T. C. 647 (1958); *Estate of Arthur W. Hellstrom*, 24 T. C. 916 (1955); *Bounds v. United States*, 262 F. 2d 876 (4 Cir. 1958); *Estate of Marvin G. Pierpont*, 35 T. C. 65 (1960), remanded, *Poyner v. Commissioner*, 301 F. 2d 287, 9 AFTR 2d 1151 (4 Cir. 1962); *Rice v. United States*, 197 F. 2d 223 (E. D. Wisc. 1961); *Olsen v. Commissioner*, 302 F. 2d 671 (8 Cir. 1962) and the instant case.

4. See Petitions for certiorari presently filed in *Commissioner v. Kuntz*, October Term, 1962, No. 394; and *Smith v. Commissioner*, October Term, 1962, No. 471.

widow has never performed any services for the corporation nor is she expected to in the future, and there is no obligation to make the payments. Accordingly, quite clearly the issue turns on the legal standard to be applied under the Internal Revenue Code to a uniform set of facts for the determination of whether the payments are compensation or gifts.

(b) The second point, which grows out of the first, involves the relationship of the present cases to this Court's decision in *Commissioner v. Duberstein*, 363 U. S. 278 (1960), which was used by the Tax Court as the basis for reversal of its position on the question. Again, two points can be made. The first is that in *Duberstein* and its companion case, *Stanton*, the relationship between the payor and the payee was very different from that in the "corporation-widow" situation. Those decisions involved the situation where the recipient of the payments (not a widow of a corporate officer) had actually performed services for the payor; also, in *Duberstein*, the corporation looked forward to future services from the payee. Finally, there was not present in those cases the tragedy of new widowhood and its attendant circumstances, financial and otherwise.

More important for present purposes, however, is the second point. The Court was asked in *Duberstein* to ennunciate an all-inclusive test for the determination of what transfers constitute gifts. The Court was faced, however, with the practical problem that payments in the business context, such as those then before the Court, may present an endless variety of factual backgrounds defying any single definition of gift. In response to this practical difficulty, the Court refused to attempt any single ultimate definition of a gift. Also in response to this practical problem, this Court held that in such situations the findings of the trier of fact must be final unless clearly erroneous.

The opposite situation pertains in the "corporation-widow" situation. As we pointed out, the essential facts in these cases are indistinguishable from each other and,

therefore, there is no basis for different findings in different cases. Thus, for example, there is no basis for different findings in *Frankel,* where the District Court found the payments to be gifts, and in the instant case where the Tax Court found the payments not to be gifts. Nor is there basis for differing results in the Courts of Appeal in the instant case, and *Smith,* as against *Olsen, Kuntz* and *Frankel,* or indeed *Poyner v. Commissioner,* 301 F. 2d 287 (4 Cir. 1962). Accordingly, it is submitted that *Duberstein* did not involve the issue presented by the "corporation-widow" situation, and the basis for the Court's decision on the scope of review set forth in *Duberstein* is not present in "corporation-widow" cases.

Under the decisions of the Tax Court, the various District Courts and the several Courts of Appeals as they now stand, the result in "corporation-widow" cases will depend entirely on the Court in which the matter is tried, although there is no factual basis for differing results in such cases. The only way in which this situation can be resolved is by decision of this Court. Accordingly, certiorari should be granted.

2. The great importance of the issue presented is fully set forth in the petitions filed by the Government in *Kuntz, Olsen* and *Frankel.* To the facts set forth therein, we can add only that it is grossly unjust to have the result of litigation depend entirely on the choice, by selection or accident, of the forum, as presently is the situation.

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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SAUL, EWING, REMICK AND SAUL,
Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,759.

ROY I. MARTIN AND ELIZABETH E. MARTIN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

Argued March 5, 1962.

Before STALEY, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT.

(Filed June 28, 1962)

By STALEY, *Circuit Judge.*

This appeal involves the taxability of money paid by a corporation to the widow of one of its officers. At his death, Arthur Purdy was president of A. R. Purdy Co., Inc. ("corporation"). Pursuant to a resolution passed by its board of directors, the corporation paid decedent's widow, petitioner,[1] $32,727.24 in 1955 and $27,272.76 in 1956. Petitioner failed to report these payments as income

1. The petitioner, Elizabeth E. Martin, was married to Roy I. Martin in 1955. The husband is a petitioner on this appeal because joint income tax returns were filed for the years in question. All future references will be to the wife-petitioner only.

on her tax returns, causing the Commissioner to assess a deficiency against her on the basis that they were subject to treatment as ordinary income. The Tax Court upheld the Commissioner, concluding that petitioner failed to establish that the payments constituted a gift.[2]

On this appeal, petitioner contends that the Tax Court misinterpreted the Supreme Court's decision in Commissioner v. Duberstein, 363 U. S. 278 (1960), as announcing a new rule for determining when payments by a corporation to a widow constitute a gift, and that under the holdings in pre-*Duberstein* Tax Court decisions, the payments here clearly constituted a gift. The Commissioner's position, also based on *Duberstein*, is broken down into two parts. First, the controlling question is why the transfer was made, and that if made from "detached and disinterested generosity, * * * out of affection, respect, admiration, charity or like impulse," it is a gift, while if the payment is for past services, it receives income treatment. Next, the Tax Court's resolution of that question is a factual one that must be affirmed unless clearly erroneous.

This court recently had occasion in Smith v. Commissioner, — F. 2d — (C. A. 3, 1962), to review the decision in Commissioner v. Duberstein, supra, and United States v. Kaiser, 363 U. S. 299 (1960). We said that, under those decisions, determination of whether a transfer constitutes a gift is a factual one that rests in the first instance with the trier of fact. That determination is to be made in light of all the relevant facts and circumstances and must be affirmed unless clearly erroneous.

We cannot say, from our review of the record, that the Tax Court's finding is clearly erroneous or charge it with relying on facts not relevant to the inquiry.

The corporation was closely held. Immediately prior to Arthur Purdy's death, its outstanding stock was held as follows:

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2. 36 T. C. No. 56 (1961).

Stockholder	Common Stock	Preferred Stock
Trust under Will of Ethel B. Purdy (deceased's mother)	588	588
Deceased	2,282½	2,282½
Elizabeth Purdy Shaw (deceased's sister)	1,825½	1,825½
Ralph W. Shaw, Jr. (deceased's brother-in-law)	304	304

Under Ethel B. Purdy's trust, upon deceased's death the trust was to terminate, whereupon one-half of the corpus was to pass to deceased's sister, and one-half was to be placed in trust for deceased's children, the trustee being Ralph W. Shaw, Jr., deceased's brother-in-law. The deceased placed his shares of stock in the corporation into two trusts, the trustees of which were the petitioner and a corporate trustee.

Within seven days after death ensued, decedent was succeeded as president by Ralph W. Shaw, Jr., his brother-in-law, and petitioner was elected to the board. Shortly thereafter, the board unanimously passed a resolution which in pertinent part read:

> "Whereas, Arthur R. Purdy, President of this Company, died on November 3, 1954 and
>
> "Whereas, he had been associated with the Company for more than 18 years and had rendered loyal and faithful service to the Company, and
>
> "Whereas, the Directors believe that recognition of such service should be made and that his salary should be paid for a reasonable period of time to his widow * * *."

The Minutes of the meeting stated:

> "* * * In view of Mr. Purdy's long and loyal service to the Company, the officers thought that his salary

> should be continued to be paid to his widow * * * for a reasonable period of time after his death in recognition of such service."

The resolution went on to provide that deceased's salary should be continued for a twenty-four month period and paid to petitioner in equal monthly installments. Two board members who supported the resolution testified before the Tax Court. One testified that the payments were "based upon the past services of Mr. Purdy." The other one, an assistant vice-president of a bank, said that he was a board member in order to help protect the bank's interests, and testified that he had met the petitioner only once and that he voted for the payments because "the services that the late Mr. Purdy had rendered to the company justified the payment on its part." He also testified that when considering the resolution, he possessed little knowledge about petitioner's financial position, although he was aware that the corporation had not been paying dividends. The corporation's year-end surplus for 1955 was $801,845.52, and $828,450.82 for 1956.

The monthly payments, equal to the amount paid decedent as a monthly salary at the time of his death, were made on regular employees' payroll checks. They were deducted as business expenses by the corporation. The 1955 payments were included in the corporation's workmen's compensation policies, and subjected to withholding tax by the corporation which was reflected on a Withholding Tax Statement, commonly known as a "W-2", issued by it at the end of the year. The corporation did not withhold tax for 1956 after petitioner executed a hold harmless agreement on its behalf.

The clear force of these facts is that the payments were made by the corporation as additional compensation for the deceased's services. Petitioner cites many cases to us, but a situation of this kind involving, as it does, the resolution of a purely factual question makes precedent of little value.

The decision of the Tax Court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,759.

ROY I. MARTIN AND ELIZABETH E. MARTIN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

Present: STALEY, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

June 28, 1962.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,759.

ROY I. MARTIN AND ELIZABETH E. MARTIN,
Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER SUR PETITION FOR REHEARING.

Present: STALEY, HASTIE and SMITH, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT,

STALEY,
Circuit Judge.

Dated:
August 15, 1962.